



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTION AND HUMAN RIGHTS DIVISION

PETITION NO. 220 OF 2019

BARBRA GEORGINA KHAEMBA.....PETITIONER/RESPONDENT

VERSUS

THE CENTRAL BANK OF KENYA.....1ST RESPONDENT

PATRICK NGUGI NJOROGE.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT/APPLICANT

RULING

1. By a notice of motion application dated 2nd July, 2019 supported by the affidavit of Faith Lukoye of even date, the Attorney General who is the 3rd Respondent in the petition seeks to have the petition and notice of motion both dated 6th June, 2019 drawn and signed by Paul Nganga Nyaga be struck out in *limine litis*. It is also prayed that the said Paul Nganga Nyaga be estopped and prohibited from further participating in the proceedings and the respondents' costs be granted and such costs be taxed and paid by the said Paul Nganga Nyaga personally. The application is grounded on the fact that the petition and notice of motion both dated 6th June, 2019 and filed in court on 7th June, 2019 were drawn, signed and filed by an unqualified person within the meaning, purpose and function of Section 9 of the Advocates Act, Cap 16 (the Act).

2. It is further averred that Mr. Paul Nganga Nyaga, who purports to be counsel for the Petitioner, Barbra Georgina Khaemba, was suspended by the Law Society of Kenya (LSK) with effect from 19th February, 2018 and remains on suspension to date. He is therefore not qualified to draw, sign or file pleadings or act in these proceedings and the pleadings drawn thereto are incompetent having been drawn and filed by an unqualified person purporting to act as an advocate. It was therefore the Petitioner's disposition that the petition and application are based on an incurable illegality and ought to be struck out forthwith with costs to the respondents.

3. The application was supported by the 1st Respondent, the Central Bank of Kenya, and the 2nd Respondent, Patrick Ngugi Njoroge.

4. Ms. Lukoye holding brief for Dr. Nyaundi appearing for the 3rd Respondent filed written submissions dated 15th July, 2019 in support of the motion. Counsel submitted that Section 31 of the Act is drafted in mandatory terms in that no unqualified person shall act as an advocate, or as such cause any summons or other process to issue, or institute, carry on or defend any suit or other proceedings. She further submitted that Section 34 of the Act provides the documents that an unqualified person shall not prepare, that is, any document or instrument relating to any other legal proceedings. She further cited Section 9 of the Act which provides for qualifications required to practice as an advocate. Also cited is Section 2 which defines the term 'unqualified person' and Section 22 which provides for the application for issuance of a practising certificate.

5. To buttress her arguments counsel cited the case of **Eunice Nganga v Law Society of Kenya [2019] eKLR** where the court observed that Section 22 is a form of regulation on the persons to whom a practising certificate should be issued with a view of weeding out those not qualified, those suspended and those struck off the Roll of Advocates from practising or holding themselves out as advocates. She also cited the recent case of **Philomena Mwilu v Director of Public Prosecutions [2018] eKLR** where a bench of five judges observed that one of the many reasons why a practising certificate is valid for a year is to disqualify any person who has been suspended from practice. It was therefore counsel's submission that Mr. Paul Nganga having been suspended for a period of two years is not qualified to practise law and is barred from holding himself out as an advocate of the High Court and therefore has no audience before this court or any other court. As such, she submitted that Mr. Paul Nganga Nyaga be stopped and prohibited from further participating in these proceedings.

6. It was further submitted that it is illegal for an unqualified person to prepare and sign court pleadings and the only option the court has is to strike them out. She cited the case of **Samaki Industries (Nairobi) Ltd v Samaki Industries (K), Civil Appeal No. 203 of 1995** in which a suspended advocate filed an appeal on behalf of a party, signing the memorandum of appeal and other relevant documents and the

court had no difficulty in holding that the appeal having been filed by an unqualified advocate on behalf of the appellant the same was incurably defective and was struck out. Similarly, she cited the case of **Mohammed Ashraf Sadique & another v Mathew Oseko t/a Oseko & Co. Advocates, Nairobi HC Misc. Appl. No. 901, 933, 934, 935, 936, 937 & 938 of 2007; [2009] eKLR** where the court held that any documents prepared or filed by an unqualified advocate were invalid and of no legal effect on the principle that courts would not condone or perpetuate illegalities.

7. Also relied on was the case of **Atulkumar Maganlal Shah v Investment & Mortgages Bank Limited & 2 Others Civil Appeal No. 13 of 2001** consolidated with **Vipin Maganlal Shah v Investment & Mortgages Bank Limited & 2 Others Civil Appeal No. 19 of 2001; [2001] KLR 190** where the Court of Appeal held that a record of appeal signed by a suspended advocate who is an unqualified person is incurably defective and ought to be struck out. Lastly, she cited the case of **National Bank of Kenya Limited v Anaj Warehousing Limited [2015] eKLR** and submitted that the Supreme Court through the said decision confirmed the position that documents prepared by an unqualified person shall be void for all purposes.

8. Counsel further relied on the amendments made to the Advocates Act through the Statute Law (Miscellaneous Amendments) Act No. 11 of 2017 where Section 2 was amended and Sections 34A and 34B introduced defining an unqualified person, providing that an advocate holding a practising certificate shall not file any legal document unless there is affixed on each such document the stamp or seal issued by LSK and lastly, a practising advocate who fails to take out a practising certificate in any year commits an act of professional misconduct respectively. To buttress her arguments, counsel cited the case of **Kasamani Charles Lutta & 4 others v Amani National Congress & 3 others [2017] eKLR** where the court held that an advocate without a practising certificate can draw and file documents but commits a professional misconduct. The court went further to hold that an advocate whose name has been struck off the roll of advocates cannot draw or sign legal documents since those documents are void for all purposes.

9. It was further submitted that in the case of a suspended advocate, he is temporarily barred from taking out a practising certificate as he is forbidden from performing his duties as an advocate for a specified interval of time. As such, the suspension amounts to being struck off the Roll of Advocates. She therefore urged the court to strike out the pleadings of Paul Nganga Nyaga for being void and cited the case of **Douglas Kamau Ngotho v Kinoisyo Company Ltd & another [2018] eKLR** where the court held that all pleadings drawn and filed by the suspended advocate were invalid and incapable of commencing proceedings and were struck out with costs which was to be paid by the suspended advocate personally and not the plaintiffs. She therefore urged the court to allow the application as prayed.

10. Senior Counsel Mr. Oraro and Ms. Rabut appearing for the 1st and 2nd respondents filed written submissions dated 19th July, 2019 in support of the motion. Counsel submitted that the only issue for determination was whether Paul Nganga Nyaga having been suspended from the Roll of Advocates on 19th February, 2018 is a person who can file documents on behalf of and represent the Petitioner in court. While citing sections 2 and 9 of the Act, counsel submitted that a person who does not meet the requirements of Section 9 of the Act on qualifications for practising as an advocate is deemed an unqualified person and therefore Paul Nganga upon his suspension on 19th February, 2018 ceased to be on the Roll of Advocates as an advocate within the meaning of Section 9 of the Act.

11. Counsel cited Section 27 of the Act which provides that an order suspending an advocate from practice shall operate to suspend any practising certificate of that advocate for the time being in force. He further relied on Section 31 which expressly precludes an unqualified person from acting as an advocate and Section 34 precluding such a person from drawing, taking instructions or filing any documents including pleadings. Counsel cited the case of **National Bank of Kenya v Anaj Warehousing Limited (2015) eKLR** where the Supreme Court held that documents drawn by an advocate who has not taken out a practising certificate are not necessarily invalid and the effect of striking out the pleadings drafted by such an advocate in that case amounted to unjust enrichment of one of the parties. The effect of that decision, counsel submitted necessitated an amendment to the Advocates Act which saw the introduction of Section 34B which now provides that the validity of any legal documents drawn or prepared by an advocate who has not taken out a practising certificate shall not be affected by the failure to obtain a practising certificate.

12. It was further submitted that under Section 2 of the Act, an advocate is required to have signed the Roll of Advocates and to hold a practising certificate before they can practice as such and when suspended, one is not an advocate neither is he protected by the provisions of Section 34B of the Act. Counsel in an attempt to distinguish the **Anaj Warehousing Limited** case from the present one submitted that the issue before the Supreme Court was whether documents prepared by an advocate who has not taken out a practising certificate should be struck out to which the court found that they should not be struck out as this would result in unjust enrichment while in the present case the issue is whether an advocate who has been suspended can file documents on behalf of a client. To buttress their argument, counsel relied on the case of **Stanislaus Kabunde v Amani National Congress & 3 others Misc. Application No. 219 of 2017 [2017] eKLR**.

13. In conclusion, counsel submitted that an advocate struck out or suspended has no authority to file any pleadings in court as an advocate and such an advocate ceases to enjoy the protection afforded to an advocate by the Act. He further submitted that the Supreme Court dealt with preparation of documents under Section 34 and did not address the issue whether an advocate who has been struck off the Roll of Advocates or is suspended can file any pleadings in court within the meaning of Section 31 which grants powers to an advocate to file documents. He therefore urged this court to allow the 3rd Respondent's application.

14. In opposing the application of the 3rd Respondent, Dr. John Khaminwa now appearing for the Petitioner submitted that there are weighty constitutional issues raised in the petition which cannot be swept under the carpet on the ground that the advocate who filed the petition had been suspended from practising law. He further submitted that the advocate who filed the petition holds a bachelor of laws degree from a recognized university. In addition, the alleged suspension was not gazetted so that all and sundry could take judicial notice thereof and the Petitioner should not therefore be penalized for approaching the advocate in good faith, giving instructions and paying for the services. Counsel invited the court to look at the constitutional issues raised in the petition as opposed to who filed the pleadings since fundamental rights are the underpinning of our Constitution. He was also of the view that the 3rd Respondent had not demonstrated that the suspension was gazetted and urged the court to disallow the application.

15. I have carefully considered the grounds in support of the application, the parties' rival affidavits and submissions and it is my view that the only issue this court is called upon to determine is whether the pleadings filed by Mr. Paul Nganga Nyaga, who was suspended from the

Roll of Advocates at the time of filing the pleadings, are valid.

16. Section 2 of the Advocates Act defines an advocate as a person “**whose name is duly entered upon the Roll of Advocates or upon the Roll of Advocates having the rank of Senior Counsel and, for the purposes of Part IX, includes any person mentioned in section 10.**”

17. The same Section 2 provides that:-

““unqualified person” means a person who is not qualified under section 9 and includes an advocate who—

- (a) is not qualified under section 9;**
- (b) is not exempt under section 10; and**
- (c) fails to take out a practising certificate.”**

18. Further, Section 9 of the Act provides as follows:-

“Subject to this Act, no person shall be qualified to act as an advocate unless—

- (a) he has been admitted as an advocate; and**
- (b) his name is for the time being on the Roll; and**
- (c) he has in force a practising certificate;**
- (d) deleted by Act No. 9 of 2000, s. 57,**

and for the purpose of this Act a practising certificate shall be deemed not to be in force at any time while he is suspended by virtue of section 27 or by an order under section 60(4).”

19. Section 27 of the Advocates Act provides as follows:-

“The making by the Disciplinary Committee or the Court of an order suspending an advocate from practice shall operate, and the adjudication in bankruptcy of an advocate shall operate immediately, to suspend any practising certificate of that advocate for the time being in force.”

20. Further Section 34 provides as follows:-

“(1) No unqualified person shall, either directly or indirectly, take instructions or draw or prepare any document or instrument—

- (a) relating to the conveyancing of property; or**
- (b) for, or in relation to, the formation of any limited liability company, whether private or public; or**
- (c) for, or in relation to, an agreement of partnership or the dissolution thereof; or**
- (d) for the purpose of filing or opposing a grant of probate or letters of administration; or**
- (e) for which a fee is prescribed by any order made by the Chief Justice under section 44; or**
- (f) relating to any other legal proceedings; nor shall any such person accept or receive, directly or indirectly, any fee, gain or reward for the taking of any such instruction or for the drawing or preparation of any such document or instrument: Provided that this subsection shall not apply to—**
 - (i) any public officer drawing or preparing documents or instruments in the course of his duty; or**
 - (ii) any person employed by an advocate and acting within the scope of that employment; or**
 - (iii) any person employed merely to engross any document or instrument.**

(2) Any money received by an unqualified person in contravention of this section may be recovered by the person by whom the same was paid as a civil debt recoverable summarily.

(3) Any person who contravenes subsection (1) shall be guilty of an offence.

(4) This section shall not apply to—

(a) a will or other testamentary instrument; or

(b) a transfer of stock or shares containing no trust or limitation thereof.”

21. Section 34A which is one of the amendments introduced in 2017 states that:-

“Subject to section 10, an advocate who holds a current practising certificate shall not file any legal documents in any registry under any law which requires filing of such document by an advocate, or issue such document for any other professional purpose, unless there is affixed on each such document the stamp or seal issued by the Society under section 23(2A).”

22. Another provision introduced through the 2017 amendments is Section 34B of the Act which provides that:-

“Validity of legal documents

(1) A practising advocate who is not exempt under section 10 and who fails to take out a practising certificate in any year, commits an act of professional misconduct.

(2) Notwithstanding any other provisions of this Act, nothing shall affect the validity of any legal document drawn or prepared by an advocate without a valid practising certificate.

(3) For the purpose of this section, "legal document" includes pleadings, affidavits, depositions, applications, deeds and other related instruments, filed in any registry under any law requiring filing by an advocate.”

23. My understanding of the law is that for one to qualify as an advocate he or she must first be admitted as an advocate, the name must appear on the Roll of Advocates and the person must have a valid practising certificate. These requirements are couched in mandatory terms and they must all be met. By virtue of Section 27 of the Act, once an advocate is suspended from practice, the practising certificate which is in force at the time of suspension is automatically suspended.

24. The 3rd Respondent posits that Mr. Paul Nganga Nyaga having been suspended on 19th February, 2018 ceased to be an advocate within the meaning of Section 9 of the Act while Dr. Khaminwa opines that since the alleged suspension was not gazetted so that all and sundry could take judicial notice thereof, the Petitioner should not be penalized for approaching the advocate in good faith, giving instructions and paying for the services. In support of his case the Attorney General has annexed a document downloaded from the LSK website indicating Mr. Paul Nganga Nyaga's practising status as suspended. This is information that is clearly available to the public and any member of the public can easily access the information.

25. The 3rd Respondent went a step further and wrote to the LSK seeking information on the professional standing of the said Paul Nganga Nyaga and was informed that he had been suspended from practising law for a period of two years with effect from 19th February, 2018. Nonetheless, he still took instructions from a client, drafted pleadings and even represented her in court knowing very well he was not qualified to practice law at the time. Much as the interest of the innocent party should not be swept under the carpet, the law also needs to be enforced. In such a situation it may be necessary for the innocent party to resort to the remedy provided by Section 34(2) of the Act.

26. It is indeed correct that Section 29 of the Act requires that the suspension or removal of an advocate from the Roll of Advocates should be gazetted. Whether Mr. Paul Nganga Nyaga's suspension was gazetted or not is a question of fact. Dr Khaminwa submitted from the bar that the suspension was not gazetted. Mr. Oraro, Senior Counsel pointed out that there was no averment that the suspension was not gazetted and had there been such an averment the respondents would have shown there was gazettement of the suspension. It is therefore difficult to make a definite finding as to whether the suspension was gazetted or not. The issue of whether or not there was publication in the Kenya Gazette of the suspension is a fact that could only be established through evidence. It is not an issue that could be addressed through submissions. The 3rd Respondent has adduced evidence to confirm that the Mr. Paul Nganga Nyaga was indeed suspended from practising law for two years.

27. The issue as to whether the requirement for publication in the Gazette was complied with or not was brought up by the Petitioner and it was incumbent upon the Petitioner to state this fact in an affidavit so that the 3rd Respondent could provide evidence to the contrary. The Petitioner failed to do so. I indeed agree with counsel for the Petitioner that the purpose of publication of the suspension in the Gazette is to give notice to the public of the suspension. However, the Petitioner's counsel cannot be allowed to make this statement of fact from the bar. In the circumstances of this case it is reasonable to conclude that Section 29 of the Act was complied with.

28. The question that needs to me answered in this case is whether Section 34B of the Act validates legal documents drafted by an advocate who has been suspended from or struck off the Roll of Advocates. In my view, Section 34B was enacted to take care of the concerns identified by the Supreme Court in **Anaj Warehousing Limited (supra)**. I do not think the Supreme Court intended to whitewash a pertinent illegality by validating documents of suspended advocates. In fact the way Section 34B of the Act is couched gives the impression that the same was meant to validate legal documents of advocates in good standing who have not taken out practising certificates. That explains the use of the term “a practising advocate”. An advocate who has been suspended or removed from the Roll of Advocates cannot be called a practising advocate. In my view, a person who has been suspended or struck off the Roll of Advocates is no longer an advocate.

29. It is the Supreme Court decision in **Anaj Warehousing Limited** (supra) that necessitated the National Assembly to amend the Advocates Act by introducing among other provisions sections 34A and 34B because while the law was clear that unqualified persons could not draw legal instruments and pleadings, it was not clear on the validity of such documents. However, a distinction between that case and the instant case is that in this case, the advocate herein was suspended from the Roll of Advocates subject to Disciplinary Cause Number 18 of 2015 for a period of two years with effect from 19th February, 2018 which automatically suspended his practising certificate at the time. In the Supreme Court case, however, the advocate simply failed to take out a practising certificate which the Supreme Court deemed should not have invalidated the charge drawn by the advocate for to do so would result in unjust enrichment of the debtor. Secondly, the issue was about an instrument or document of conveyance drawn by an advocate who did not, at the time of drawing such an instrument or document, have a current practising certificate. Does the same reasoning apply to pleadings drawn and filed in court by a person whose actions have been found unprofessional and suspended from legal practice? I do not think so. Suspension cannot be equated to failure to take out a practising certificate.

30. In the case at hand we are talking of an advocate who was already suspended from practising as an advocate at the time of drafting the legal documents. In my view, it would be more harmful to society to encourage such a person to continue practising by holding that legal documents drafted by him or her are valid. The disciplinary proceedings that are meant to maintain high professional standards within the legal profession will amount to nothing, for persons suspended or removed from the Roll of Advocates will continue receiving instructions, drafting pleadings and earning fees from a profession in which they have been found unfit to practice. The courts must stress the policy that it does not condone illegalities.

31. Dr. Khaminwa for the Petitioner urged me to consider that the petition raises matters of public interest. I agree that the petition is indeed not frivolous. However, unlike the position in the case of **Anaj Warehousing Limited** where the consequence of declaring the legal document invalid meant that the bank would have not been able to recover the loan advanced to a debtor, the Petitioner herein had the option of filing her petition afresh. It is not like she had been left completely without remedy. Considering that she had an option, which she declined to take at the opportune time, she cannot blame anybody for her predicament.

32. Dr. Khaminwa invited me to hold that matters of human rights should be viewed from special lenses and the striking out of the petition should not be an option in this case. I decline the invitation to find that matters which touches on legal practice can be ignored in order to propel forward a constitutional matter.

33. From what I have stated in this ruling, it follows that the 3rd Respondent's application seeking to strike out the pleadings in this matter has merit. The application is allowed as prayed.

34. I was urged to award costs against Mr. Paul Nganga Nyaga in person. I agree that this is necessary in this matter. It is wrong for an advocate who is aware of his suspension to take instructions, receive fees and file legal documents in court. The respondents' costs in respect of these proceedings shall be met by Paul Nganga Nyaga in person.

35. It is also important that the Law Society of Kenya is alerted of the unprofessional conduct of Mr. Paul Nganga Nyaga so the necessary disciplinary steps may be taken. In that regard, the Deputy Registrar of this court is directed to transmit to the Law Society of Kenya certified copies of this ruling, pleadings and proceedings.

Dated, Signed and Delivered at Nairobi this 26th day of September, 2019.

W. Korir,

Judge of the High Court